and disbursements is under the bill and the commission agreement 'was cancelled'. Further, no payment of any sum, whether under the note, the commission agreement or the bill, has been made to the respondent for the services which he had rendered to Peter Chaw. Nonetheless, the fact remains that he took advantage of Peter Chaw as a client and abused his position as a solicitor, and that is a serious matter. In all the circumstances, we order that the respondent be suspended from practice for a period of two months and that he should pay the costs here and before the committee.

*Order accordingly.*

Solicitors: *B Mohan Singh & Co*; *Bernard Doray Rada & Partners*.

Reported by *PS Ranjan*

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## Mohd Sainudin bin Ahmad v Consolidated Hotels Ltd & Anor

HIGH COURT (SINGAPORE) – SUIT NO 3244 OF 1982
THEAN J
30 DECEMBER 1987

*Tort – Negligence – Plaintiff injured by falling brick in construction site – Owner of site engaged supervisors and architects to supervise building works – Whether owner of site still retained possession and control of site – Whether negligence was attributable to main contractor – Whether owner of site vicariously liable to plaintiff for any negligent act of main contractor*

The first defendant, the owner of a site on which a building was being constructed, engaged S Co as the main contractor in the construction of the building. The plaintiff was an employee of a scaffolding sub-contractor of S Co. While the plaintiff was working at the construction site, a brick fell from the upper floors and landed on his head, injuring him seriously. The plaintiff brought this action for damages for negligence against the first defendant as the owner and occupier of the construction site ('the premises'). The plaintiff submitted that as the first defendant engaged supervisors and architects to supervise the building works the first defendant did not cease to be in possession of the premises entirely and had retained sufficient control to make the first defendant the occupier of the premises.

**Held,** dismissing the claim:

(1) Possession of the site was at the material time vested in the main contractor and it had control of the site and the building then under construction. The architects were engaged by the first defendant as professional advisers in the construction of the building and they were independent contractors and not servants of the first defendant. There was no evidence that, apart from supervision to ensure the quality of workmanship and materials of the building, they exercised any control over the premises. In these circumstances, it can hardly be said that the first defendant, as the owner of the premises, had through the architects and the supervisors retained any measure of control over the premises in consequence of which it remained as an occupier thereof.

(2) The first defendant was merely the owner of the premises. If there was any negligence, such negligence was caused by or attributable to the main contractor or others on its behalf who caused the brick to fall on the plaintiff. The main contractor was an independent contractor and the first defendant cannot be vicariously liable to the plaintiff for any negligent act or omission of the main contractor.

[*Editorial Note*: The plaintiff has appealed to the Court of Appeal vide Civil Appeal No 3 of 1988.]

**Cases referred to**

1 *Wheat* v *E Lacon & Co Ltd* [1966] AC 552 (refd)
2 *Lembaga Kemajuan Tanah Persekutuan* v *Mariam & Ors* [1984] 1 MLJ 283 (distd)
3 *Honeywill & Stein Ltd* v *Larkin Brothers (London's Commercial Photographers) Ltd* [1934] 1 KB 191 (distd)
4 *Bunker* v *Charles Brand & Son Ltd* [1969] 2 QB 480 (distd)
5 *Ferguson* v *Welsh & Ors* [1987] 1 WLR 1553 (folld)

*Subbiah Pillai* for the plaintiff.
*Ranvir Kumar Singh* for the first defendant.

*Cur Adv Vult*

**Thean J:** The plaintiff was at the material time an employee of the second defendant, who was a scaffolding sub-contractor of SA Shee & Co Pte Ltd; the first defendant was the owner of a site, on which the building, now known as Peninsula Plaza, was being constructed, and SA Shee & Co Pte Ltd was engaged by the first defendant as the main contractor in the construction of the building. On 8 August 1979, while the plaintiff was working at the construction site, tying poles with rattan on the third floor of the partially completed building, a brick fell from the upper floors and landed on his head, and in consequence he sustained very serious injuries. He brought this action against the defendants for damages for negligence.

His claim against the second defendant was simple and straightforward. The second defendant was his employer and he claimed against him, the second defendant, for failing to provide a safe and proper system of work and exposing him to the risk of damage and injury. The second defendant entered an appearance, but did not defend the claim, and interlocutory judgment was entered against him with damages to be assessed. The solicitors then acting for the plaintiff applied for damages to be assessed and damages were assessed at $209,920; final judgment for this amount was entered against the second defendant. This judgment has not been satisfied and the second defendant's whereabouts are unknown.

The plaintiff now pursues his claim against the first defendant as the owner and the occupier of the construction site ('the premises'), and in his statement of claim he avers that the first defendant was negligent in the following respects: in failing to take reasonable care to see that

the plaintiff would be reasonably safe in using the premises; in failing to take any adequate or effective precautions to ensure that the brick from the upper floors of the building would not fall on him; in causing or permitting the premises to be in an unsafe and dangerous state, and lastly, in failing to discharge the common duty of care towards him.

The claim is resisted by the first defendant, and the defence is simply this: the first defendant had engaged SA Shee & Co Pte Ltd ('the main contractor') to construct the building and had handed over to the main contractor possession of the premises, and at all material times the first defendant was not an occupier of the premises. Further, the first defendant avers that it had acted reasonably in entrusting the construction of the building to the main contractor and that the first defendant was not responsible to ensure the safety of the premises or the adequacy or effectiveness of precautions or measures taken against any risk or damage.

The facts are not very much in dispute. It is common ground that the first defendant was at the material time the owner of the site on which the building was then under construction, that it had engaged the main contractor under a building contract dated 20 October 1976 to carry out the construction, that possession of the premises had been handed to the main contractor, and that Alfred Wong & Partners were the architects of the first defendant in charge of the project. It is also common ground that at the time of the accident the second defendant was the scaffolding sub-contractor engaged by the main contractor and the plaintiff was an employee of the second defendant. At that time the main contractor was still carrying on construction works at the premises and the accident took place at that part of the premises abutting the service road at the rear. It was not suggested, and there was no evidence to the effect, that that part of the premises where the accident took place had been completed and possession thereof had been handed back by the main contractor to the first defendant.

It is argued on behalf of the plaintiff that the first defendant is liable to him on two grounds. First, at the material time the first defendant was the occupier of the premises and the plaintiff sustained injuries thereat owing to the negligence of the first defendant. Secondly, at the material time the first defendant was the owner of the premises where activity was being carried out and the plaintiff suffered injuries as a result of the activity being negligently carried out thereat.

In support of his claim on the first ground, the plaintiff relies on the provisions of the building contract made between the first defendant and the main contractor. The first defendant had engaged Alfred Wong & Partners as the architects to supervise the construction of the building and under various provisions of the contract the architects as the agent for the first defendant had extensive powers in relation to the works carried out by the main contractor. In particular, reliance is placed on the following conditions of the contract, namely:

(a) condition 2(1) under which the main contractor had to comply with all reasonable instructions issued by the architects;

(b) condition 6(3) under which the architect may issue instructions requiring the main contractor to open up for inspection any work covered up, or arrange for a test to be carried out of any materials or goods or of any executed work;

(c) condition 6(4) which provides that the architects may issue instructions in regard to removal from the site of any work, material or goods, and

(d) condition 6(5) which empowers the architects to issue instructions requiring the dismissal from the works of any person employed thereon.

Counsel for the plaintiff also relies on the fact that the first defendant engaged supervisors to supervise the works: one site engineer to look after the mechanical and electrical works, one clerk-of-works to look after structural works and one clerk-of-works to look after the building works. It is argued on behalf of the plaintiff that in view of all these the first defendant did not cease to be in possession of the premises entirely and had retained sufficient control to make the first defendant the occupier of the premises. I am unable to accept this argument. Possession of the site was at the material time vested in the main contractor and it had control of the site and the building then under construction. According to Chew Meng Chong, DW2, possession was handed over to the main contractor on 9 June 1976 who took complete control of the site. The architects were engaged by the first defendant as professional advisers in the construction of the building and they were independent contractors and not servants of the first defendant. Plainly, the purpose of engaging the architects and the supervisors was to ensure the quality of workmanship and materials of the building and that the building was constructed by the main contractor in a workman-like manner and in accordance with the building contract. It was not suggested, and again there was no evidence, that apart from such supervision, they or any of them exercised any control of the premises. In these circumstances, it can hardly be said that the first defendant, as the owner of the premises, had through the architects and the supervisors retained any measure of control over the premises in consequence of which it remained as an occupier thereof.

Both counsel for the plaintiff and the first defendant relied on *Wheat* v *E Lacon & Co Ltd*[1] in support of their respective arguments. That case, in my view, is not of much assistance here, apart from some general observations made by Lord Denning on the term 'occupier'. He said, at pp 578-579:

> In *Salmond on Torts*, 14th Ed (1965), p 372, it is said that an 'occupier' is 'he who has the immediate supervision and

> control and the power of permitting or prohibiting the entry of other persons'. This definition was adopted by Roxburgh J in *Hartwell* v *Grayson, Rollo & Clover Docks Ltd* [1947] KB 901 and by Diplock LJ in the present case. There is no doubt that a person who fulfils that test is an 'occupier'. He is the person who says 'come in'. But I think that test is too narrow by far. There are other people who are 'occupiers' even though they do not say 'come in'. If a person has any degree of control over the state of the premises it is enough. The position is best shown by examining the cases in four groups.

and one of the groups he gave was a situation where one employed an independent contractor to do work on premises or a structure. He said, at p 580:

> Fourthly, where an owner employed an independent contractor to do work on premises or a structure, the owner was usually still regarded as sufficiently in control of the place as to be under a duty towards all those who might lawfully come there.

This dictum is an obiter and sets out in broad terms an instance where an owner of premises could be considered an occupier thereof. Much of course depends on the facts of a particular case. In this case, in my opinion, the facts cannot sustain a conclusion that the first defendant was at the material time an occupier of the premises.

Counsel for the plaintiff also relies on the case of *Lembaga Kemajuan Tanah Persekutuan* v *Mariam & Ors.*[2] There, Felda, a statutory authority, entered into a written agreement with a contractor for weeding and maintenance of some land under a scheme in Pahang. The contract prohibited the contractor from sub-contracting any part of the work under the contract without the consent of Felda's chairman. In breach of this clause the contractor sub-contracted the work to a sub-contractor who engaged workers to carry out the work. A kongsi-house was built for the workers so employed to live. One night the kongsi-house collapsed and a worker was killed. His dependants brought an action against Felda, the contractor and the sub-contractor. Both the contractor and the sub-contractor disappeared and the substantive defendant was undoubtedly Felda. The contract between Felda and the contractor provided, inter alia, that possession of the site was given to the contractor 'as complete as may be reasonably possible but not so as to constitute a tenancy'. On the basis of this clause it was submitted on behalf of Felda that the contractor had exclusive possession of the land and Felda could not be an occupier so as to render it liable to the deceased. That argument was rejected and the Federal Court of Malaysia held that, having regard to the other provisions of the contract, which gave to Felda general control and supervision of the work of the contractor and also the well-being of the workers working in the scheme, Felda did not cease to be in possession of the land and was an occupier who had control over the land at the relevant time. The court also held that that was an agricultural contract and besides weeding, for which Felda had entered into the contract in question, there must be other works involved on the land, such as planting, replanting, earth work, and fertilizing. In the result, the court came to the conclusion that only such possession was given to the contractor 'as was reasonably necessary for the purpose of weeding and maintaining the scheme'. That case is clearly distinguishable, and the facts here are entirely different. This is a building contract and to carry out the contract the main contractor must have, and was given, possession of the entire site and it had taken control of the site.

Even if I am wrong and the first defendant was at the material time an occupier of the premises, the first defendant, as the occupier, would still not be liable to the plaintiff. The duty owed by the first defendant to the plaintiff who was upon the premises as an invitee – in my opinion, he was an invitee – is to use reasonable care to prevent damage to him from unusual danger which the first defendant knew or ought to know. But the plaintiff was not injured by reason of any defective or unsafe physical condition of the premises. The plaintiff was injured by current operations at the premises, and the current operations were not carried out by the first defendant but by the main contractor or others on its behalf. It is therefore irrelevant whether or not the first defendant was at the material time an occupier of the premises.

I now turn to the next ground on which the plaintiff's claim is founded, namely: the first defendant being owner of the premises was liable for damage caused by the current operations conducted at the premises. It is not disputed that the injuries sustained by the plaintiff were caused by current operations but these were being carried out at the said premises by or on behalf of the main contractor; the first defendant was merely the owner of the premises. If there was any negligence, such negligence was caused by or attributable to the main contractor or others on its behalf who caused the brick to fall on the plaintiff. The main contractor was an independent contractor and the first defendant cannot be vicariously liable to the plaintiff for any negligent act or omission of the main contractor in this case.

I did initially think that the cases of *Honeywill & Stein Ltd* v *Larkin Brothers (London's Commercial Photographers) Ltd*[3] and *Bunker* v *Charles Brand & Son Ltd*[4] might be applicable, and invited counsel to submit further arguments. However, on further consideration, I am satisfied that neither of them is really applicable. In the first case, the plaintiffs who were acoustic specialists had installed a sound reproduction apparatus in a theatre and subsequently obtained permission from the owner of the theatre to have photographs taken for their own business purposes, and they engaged the defendants to take the photographs. The defendants used flashlight to take the photographs which involved ignition of a certain amount of magnesium powder and that powder on being ignited flared up and developed intense heat and was dangerous

to fabric and other inflammable material. The defendants in taking the photographs, ignited the magnesium powder near the curtain which caught fire and damage was caused. The plaintiffs paid to the owner of the theatre an amount to cover the cost of repair and claimed the same amount from the defendants. The defendants resisted the claim on the ground that the plaintiffs would have had a defence to the claim by the theatre owner on the ground that the damage was caused by the defendants who were independant contractors. It was held by the Court of Appeal in England that the plaintiffs were liable to the owner of the theatre for damage caused by the defendants, and that the work involved was of a dangerous character which imposed on them, the plaintiffs, an obligation to take special precaution and they could not avoid liability by engaging an independent contractor to carry it out. Slesser LJ, in delivering the judgment of the court said, at p 200:

> To take the photograph in the cinema with a flashlight was, on the evidence stated above, a dangerous operation in its intrinsic nature, involving the creation of fire and explosion on another person's premises, that is in the cinema, the property of the cinema company. The appellants, in procuring this work to be performed by their contractors, the respondents, assumed an obligation to the cinema company which was, as we think, absolute, but which was at least an obligation to use reasonable precautions, to see that no damage resulted to the cinema company from these dangerous operations: that obligation they could not delegate by employing the respondents as independent contractors, but they were liable in this regard for the respondents' acts.

The factual situation here is entirely different. The first defendant was the owner of the site and engaged the main contractor to carry out thereon the construction of the building, and the main contractor, amongst other things, engaged the second defendant as the scaffolding sub-contractor. The second defendant employed the plaintiff who was injured while working at the site. In these circumstances, vis-à-vis the plaintiff, there is no question of the first defendant being under such an absolute obligation as enunciated in the judgment of Slesser LJ. If there were such an obligation then every owner of a construction site would be liable to an employee, whether of the main contractor or sub-contractor, who is injured at the work-site. I cannot see how in ordinary circumstances such an owner can be held liable.

The second case of *Bunker* v *Charles Brand & Son Ltd*[4] is also not applicable. There, the main contractor of a tube tunnel engaged a specialist sub-contractor to carry out certain work in the tunnel and an employee of the latter was injured at work in the tunnel. He claimed against the main contractor for damages for breach of duty under the Occupiers' Liability Act 1957. O'Conner J held, inter alia, that the main contractor remained occupier of the tunnel and that control of the tunnel remained in the main contractor through its responsible officials. That decision therefore turned on the facts of the case and the provisions of the Occupiers' Liability Act 1957.

In my view, the injuries sustained by the plaintiff were caused by the current operations carried out by or on behalf of the main contractor or by the unsafe system of work provided by the second defendant as the employer, or by both. In either case, the first defendant is not liable, even if it can be said to be an occupier of the premises. In this connection, the recent case of *Ferguson* v *Welsh & Ors*[5] is of some assistance. There, a district council engaged a contractor to demolish a building on a site owned by the council. The contractor in turn engaged a sub-contractor to carry out the work and in the course of the demolition an employee of the sub-contractor was injured owing to the unsafe system of work provided by the sub-contractor. It was held that the council, though an occupier of the site, was not liable either under the Occupiers' Liability Act 1957 or at common law. Lord Keith, in his speech, said at p 1560:

> The absence of safety arose directly out of the system of work adopted by the Welsh brothers, and the nature of the instructions given by them to Mr Ferguson as to how he should go about performing his work for them. It would be going a very long way to hold that an occupier of premises is liable to the employee of an independent contractor engaged to do work on the premises in respect of dangers arising not from the physical state of the premises but from an unsafe system of work adopted by the contractor.

Lord Goff went further. He said, at p 1564:

> I wish to add that I do not, with all respect, subscribe to the opinion that the mere fact that an occupier may know or have reason to suspect that the contractor carrying out work on his building may be using an unsafe system of work can of itself be enough to impose upon him a liability under the Occupiers' Liability Act 1957, or indeed in negligence at common law, to an employee of the contractor who is thereby injured, even if the effect of using that unsafe system is to render the premises unsafe and thereby to cause the injury to the employee. I have only to think of the ordinary householder who calls in an electrician; and the electrician sends in a man who, using an unsafe system established by his employer, creates a danger in the premises which results in his suffering injury from burns. I cannot see that, in ordinary circumstances, the householder should be held liable under the Occupiers' Liability Act 1957, or even in negligence, for failing to tell the man how he should be doing his work. I recognize that there may be special circumstances which may render another person liable to the injured man together with his employer, as when they are, for some reason, joint tortfeasors; but such a situation appears to me to be quite different.

For all these reasons, the plaintiff's claim against the first defendant fails and is dismissed with costs.

*Application dismissed.*

Solicitors: *Patrick Koh & Co*; *Kong Chai & Partners*.

Reported by *Ng Sheau Jiuan*